IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.95 OF 2007

Jayant N. Sheth,
Proprietor M/s.Struct-Mast Engineers,
26, Mandvi Chambers, 3rd Floor,
184, Samuel Street,
Mumbai - 400 009 .. Petitioner.

Versus

New Usha Kiran Co-Op. Hsg.Soc.Ltd.
15, M.L. Dahanukar Marg,
(Old Carmichael Road)
Mumbai - 400 026 .. Respondents.

Mr.Phiroz Palkhiwala i/b.Pimeta Kapasi & Co. for petitioner.
Mr.S.U.Kamdar i/b.Thakore Jariwala for respondents.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 13th July, 2007.

ORAL ORDER :-

1. By the order dated 13th July, 2007, this petition was dismissed for the reasons separately recorded. The reasons are set out hereinbelow.

2. This is a petition under Section 34 of the Arbitration & Conciliation Act, 1996, challenging the Award dated 29th November, 2006, copy of which is annexed as Exh."A" to the petition.

3. The brief facts leading to the Award are that the petitioner is the original claimant and the respondents are the original opponents.

4. The petitioner shall hereafter referred to as "the Claimant" and the respondents as "the said Society".

The Society gave a contract to the Claimant for the purpose of carrying out major repair work of its building. The contract work was for a period of 18 months and the date of commencement was 29th January, 1989. The work was to be

over by 29th July, 1990. The total contract amount was estimated at Rs.47,56,609/- and it was a item rate contract. There was delay in the work and the Claimant blame the Respondents for the said delay. However, it is not necessary for me to go into the question of delay. It is an admitted position that the Claimant completed roughly 45% of the work. It is the case of the Claimant that the work was held up because of various reasons including non payment of his bills. It is the case of the said Society that the Claimant abandoned the work.

The disputes arose in 1995 and were referred to two Arbitrators, and the same was referred to as "the first arbitration".

In the first arbitration, the Claimant made several claims referred to as Claim Nos.1A, 1B, 1C and also Claim Nos.2 to 16. The Arbitrator made an Award in favour of the Claimant and awarded a sum of

Rs.14,02,349/- in respect of Claim No.1(A) and Rs.18,56,483/- in respect of Claim No.1(B). All the other claims were rejected.

The Respondents challenged the said Award in this Court by filing an Arbitration Petition No.42 of 1998. The said Arbitration Petition was disposed off by an Order dated 11th January, 2000 whereby the Award in respect of Claim No.1B was set aside and the Award in respect of Claim No.1A was sustained. The dispute regarding Claim No.1B was referred to Arbitration of a Sole Arbitrator and in the meanwhile the Respondents were directed to pay the amount awarded under Claim No.1A viz. the sum of Rs.14,02,349.50. The respondents have paid the said amounts.

In the second Arbitration, the Arbitrator made an Award dated 19th May, 2005, for Rs.14,39,032.88 in respect of Claim No.1(B). This was again challenged by the

Respondents in this Court This Court set aside the Award by consent of the parties and the matter was eventually referred to Sole Arbitration of Hon'ble Shri.H.Suresh (Retd. Judge of this Court).

5. Thus, this arbitration was restricted to claim No.1(B). That claim was for quantities, exceeding 15% of the scheduled quantities as per Condition No.4 of the General Condition for Contract. In other words, the quantities, which exceeded the limits specified in this Condition, form subject matter of the claim. The claim was made for Rs.70,36,513/-.

6. It is the contention of the petitioner-claimant that the respondents should have paid them at market rate for the quantities in excess of 15%. They have not paid the claimant for the work that exceeded the ceiling limit of 15%. The work done, in the Bills of Quantities ("BOQ" for short), whose quantity has exceeded more than 15%, and details of the market rates for various items was supplied to the respondents. The rates that were claimed were prevailing market rates inasmuch as similar work of repairs was undertaken with regard to the building of Jaslok Hospital, which is multistoried, situate within the

vicinity of the respondent Society's building. The claimants stated that rate was based on the prevailing rate of 1990. The matter was followed up with the respondents Engineer, who examined, verified, certified and recommended to the respondents on 16th November, 1992, the market rate, submitted by the claimant. The entire claim was for the difference in market rate and Bills of Quantities, rate for the quantity exceeding 15%, which has not been paid by the respondents under the terms of the Contract.

7. The claimants relied upon the terms and conditions, bills of quantities and correspondence so also the other relevant documents to support their claim.

8. Insofar as this claim is concerned, the respondents-Society contended that the amount beyond the rates specified is not payable. They pointed out that :-

a) With respect to the Claim amount of Rs.26,315/- as sought for in Serial No.(a), towards 'Bamboo Scaffolding' and the Claim amount of Rs.17,20,000/- towards the suspended platform (Serial No.8) charges, these Respondents reiterate that the said expenses are a one time expense in a

repair/construction project and thus the monies in respect thereof have already been paid to the petitioner. It is submitted that in some of the letters addressed by the petitioner, they have stated that due to the rains, the said structures had to be rebuild etc. The Respondents state that throughout the period that the petitioner were on site, the said structure of the Bamboo Scaffolding and the said suspended platform were on site and have in fact never been dismantled. In any event, no supporting/evidence whatsoever have been produced by the Petitioner in respect of the said Claim till date. Further, without prejudice to all that is stated herein, the Respondents state that the said Claims are highly exaggerated and completely arbitrary and unsubstantiated.

b) Claims made under Serial Nos.3,4,5,6,7 and 10 are all in respect of cement work and the Consultants have taken into account the cost of escalation of cement prices while the Certifying the Claims at Rs.14,02,349.50 in December, 1994, which amounts have already been factored in the bills submitted by the petitioner and have already been paid and also forms a part of Claim 1(A).

c) Claim at Serial No.11 refers to SBR Latex. It is pertinent to note that the price of this chemical has not gone up at all. They have claimed price of Rs.75/- per kg. for SBR-Latex. Even at the time of filing the said Written Statement the market price for the same was Rs.68/- per kg. In any event, to claim an escalation of Rs.35/- lakhs in a product costing Rs.65/- per kg. would mean using quantity of 2 lakhs kg. as per any hand book the latex used in certified quantities cannot exceed 500 kg.

d) In respect of the Claim amount of Rs.38,135.16 and Rs.36,611.48 sought for in Serial Nos.2 and 9 of the said Claim 1(B) the respondents state that these claims relate to works to be carried out prior to commencement of any repair work. Thus, it is submitted that the same cannot be a part of any extra work, much less any escalation in cost, can be claimed in respect thereto."

9. Besides, pointing out that the claim has rightly been rejected in the light of the terms and conditions and

more particularly, Clause 4 factually as well, the liability was denied.

10. The parties appeared before the Sole Arbitrator and tendered compilation of documents. Besides the statement of claim and the reply, the parties agreed that no oral evidence would be led. After considering the pleadings and rival submissions, the learned Arbitrator made his Award and rejected Claim No.1(B) in its entirety. He directed the claimants to pay to the respondents, a sum of Rs.75,000/- towards costs of arbitration.

11. It is this Award, which is a subject matter of challenge in this petition.

12. Mr.Palkhiwala, learned Counsel, appearing for the petitioner-claimant submits that the Award is vitiated for two reasons. Firstly, the learned Arbitrator has not conducted the proceedings in a fair, just and proper manner. He highlighted this aspect with regard to the fees charged by the learned Arbitrator. He submits that there was a clear understanding with regard to the fees. In any event, this matter was never discussed in the meetings. Reliance is placed by Mr.Palkhiwala on the Minutes of the Meeting dated 3rd May, 2006, wherein, the

respondent-Society was directed to deposit a sum of Rs.30,000/- as per the order of this Court. He submits that there is no bifurcation with regard to the fees and more particularly, reading charges and meeting fees. He has invited my attention to the order passed by this Court referring the above claim to the Sole Arbitrator. He submits that the arbitration was under the High Court Scheme and the Arbitrator was entitled to charge only a sum of Rs.3,000/- per hearing and Rs.10,000/- as reading fees, subject to an overall limit of Rs.75,000/-. In the present case, only six meetings had been held, including two preliminary meetings. Even if, the Arbitrator has charged Rs.10,000/- as reading fees, the total fees receivable could have been only Rs.28,000/-. There is no question of respondents paying Rs.75,000/- to the Arbitrator and the petitioner, therefore, reimbursing the same. Mr.Palkhiwala has invited my attention to the letter dated 3rd January, 2007. He submits that the High Court Scheme was evolved on the basis that the costs of arbitration do not become prohibitive but remain affordable. Therefore, there was no question of calling upon the parties to pay any sums over and above those stipulated in the High Court Scheme. In these circumstances, the Award be set aside as it is contrary to public policy.

13. It is not possible to accept both contentions of Mr.Palkhiwala. Insofar as the payment of fees is concerned, the learned Sole Arbitrator had specifically pointed out that the respondents shall fix the venue and inform the parties. The respondent was directed to deposit a sum of Rs.30,000/-.

14. The argument is that the petitioner was liable to pay only the fees under the scheme framed by the High Court is concerned. There is no merit in the same. The arbitrator's name is suggested from the Panel maintained by the High Court. The scheme also stipulates the charges. The initial payment was to be made by the petitioner and it was clarified in the order, appointing the Arbitrator that the Arbitrator is free to issue suitable directions in the award about the payment of fees. Thus, the Arbitrator was not bound to accept the amount mentioned in the scheme or any lumpsum fees as urged. It was open for the Tribunal to determine the fees and that is how parties appeared before it. The learned Arbitrator has not charged any excess fees inasmuch as from a perusal of the various meetings, it is apparent that the Arbitrator has not deviated to such an extent as would make it impossible for the parties to bear the costs

of arbitration. The fees are reasonable and not excessive. Further, some marginal deviation from the scheme prepared by this Court is not of significance, when, parties do not object to it. The Award is, therefore, not vitiated on that count. Thus, the Award cannot be set aside on the ground that it is contrary to public policy as the fees charged are not excessive, exorbitant and unreasonable.

15. Insofar as the main submission of Mr.Palkhiwala is concerned, even there, I am of the view that the claim was restricted to claim No.1B. The learned Arbitrator has referred to the condition No.4. There is substance in the contention of Mr.Kamdar that the interpretation placed by the Arbitrator on this condition is not perverse. A bare perusal of condition No.4 will reveal that the schedule of quantities given in the Contract Bill was provisional. They were meant to indicate the extent of the work and to provide a uniform basis for tendering. The owner reserved right to increase or decrease any of the quantities plus or minus 15% or to totally omit any item of work and the contractor was not be liable to be paid any extra or damages on these grounds.

16. In paragraph 10 of the Award, the learned

Arbitrator has rightly understood the condition. The learned Arbitrator has in paragraphs 12 to 14, analyses the claim even under other clauses of the Contract. He has concluded that the claimant is not entitled to any sum under the head (scaffolding). Thus, interpretating the Contract term, the Arbitrator has held that the petitioner-claimant is not entitled to any escalation. He has been already paid as against the original contract sum of Rs.47,56,609/-, Rs.82,02,069/-. The sum was paid for only about 45% of the work. In the notice dated 22nd July, 1994, the amount claimed by the petitioner-claimant was Rs.16,79,442.53. This was much before the first Award was made. He received a sum of Rs.14,02,349.50 under Claim No.1A. The Claim No.1B was for Rs.70.00 lakhs, for which there is no basis at all. Thus, this claim is raised as an after thought. Hence, rejection of Claim No.1B by the Arbitrator is not vitiated as being contrary to the contract terms and conditions. The claim is scrutinised on the touch-stone of the contract terms. The interpretation thereof by the Arbitrator cannot be interfered with even if another view is possible.

17. In the result, the challenge to the Award fails. Petition is accordingly dismissed. No order as to costs.

(S.C.Dharmadhikari, J.)